Boustead Pelita Tinjar Sdn Bhd (formerly known as Boustead Pelita Plantation Sdn Bhd) v Niga ak Ngayong & Ors and another suit

HIGH COURT (MIRI) — SUIT NO MYY-22–12/6 OF 2012 AND MYY-22–24/8 OF 2012
MAIRIN IDANG JC
16 JUNE 2016

Land Law — Native land and custom — Land dispute — Customary rights over land — Whether claims for native customary rights proved on balance of probability — Legal burden to establish native customary rights — Whether defendants entitled to remain in possession and occupation of land — Sarawak Land Code (Cap 81) s 5(7)

The plaintiff had been issued with a provisional lease for approximately 4827 hectares on which had been sub-divided into lots. The provisional lease was within the 'Lemiting Protected Forest' *gazette* ('LPF') under Sarawak Government *Gazette*. The defendants were all Ibans and they are natives of Sarawak. There were two suits filed by the plaintiff. The defendants in the first suit were from RH Niga ('RHN') and RH Anchum ('RHA') while those in the second suit were from RH Balang ('RHB'). The plaintiff's claims in the said suits were for a declaration that the defendants were not entitled to remain in possession of Lot 15 Tinjar Land District ('Bukit Limau Estate') or any part of it; a declaration that the defendants were in occupation of Bukit Limau Estate without licence or consent; a declaration that the plaintiff was entitled to recover possession of Bukit Limau Estate; an injunction that the defendants be restrained from entering, occupying or trespassing on Bukit Limau Estate; harvesting, cutting or taking away any oil palm fruits or fresh fruit bunch from Bukit Limau estate; hindering, interfering, preventing or otherwise affecting the plaintiff's rights in respect of Bukit Limau Estate, including the right to possession of Bukit Limau Estate for the purpose of developing Bukit Limau Estate into oil plantation areas; and hindering, interfering, preventing or otherwise affecting the plaintiff's operation of an oil palm plantation and ancillary services on Bukit Limau Estate. The defendants counterclaimed against the plaintiff for a declaration that the plaintiff or its agents or servants were wrongfully trespassing on the defendants' said land within the disputed areas; an injunction restraining the plaintiff from wrongfully trespassing or from entering or using or occupying the defendants' said land within the disputed areas; and damages.

Held:

(1) To prove their claims for native customary rights ('NCR'), the defendants must do so on a balance of probability. Section 5(7) of the Sarawak Land Code ('the Code') is very clear, the legal burden to establish NCR lies with the defendants who pleaded that they have NCR. This principle is consistent with the provisions of s 101 of the Evidence Act 1950 (see para 12).

(2) The defendants have not explained and not provided any evidence of their presence within the vicinity of the LPF. In fact after the constitution of the LPF, there were only 12 longhouses listed in the Second Schedule to the *gazette* notification in 1951 that were recognised as having NCR but the defendants' longhouses were not in the said list. The said list in the Second Schedule speaks volume of the status of the three longhouses because had they been there the defendants would have definitely challenged the constitution of the LPF or alternatively they would have been heard and/or consulted by the forestry officer and they would definitely be amongst those 12 longhouses listed. In 1951, the defendants in all probability were not within the vicinity of the LPF and as such they did not have NCR over the same. On a balance of probability, the plaintiff had proven their case against the defendants (see paras 30 & 35).

(3) The claims were already settled way back in 1951 when the LPF was *gazetted* where only 12 longhouses were recognised but not the three longhouses. The defendants would have known of the status of the LPF in 1958 when they allegedly came to settle within the vicinity of the LPF. Those residents of the 12 longhouses listed in the Second Schedule to the *gazette* notification in 1951 would have told the defendants of the longhouses about this LPF. The residents of the three longhouses should have taken steps to register their claims or commence action against the government or the Department of Lands and Surveys or the Forest Department then in 1958 (see paras 31 & 47).

(4) In 1993 when the provisional lease issued, the defendants should have taken action against the government but did not. When the plaintiff commenced development of the said BLE in 1997, the defendants of the longhouses should have seen the cultivation of the BLE yet did not lodge any complaints with the plaintiff and had not filed any action against the plaintiff and the government on their NCR claims. The defendants' action against the government had they named the government in their counterclaim would be barred under Public Authorities Protection Act 1948. The defendants' counterclaim against the plaintiff was also time barred under the Sarawak Limitation Ordinance (see para 47).

[Bahasa Malaysia summary

Plaintif telah dikeluarkan dengan pajakan sementara untuk kira-kira 4,827 hektar yang telah dibahagikan kepada lot-lot. Pajakan sementara terangkum dalam *warta* 'Mengehadkan Hutan Yang Dilindungi' ('MHYD') di bawah *Warta* Kerajaan Sarawak. Defendan-defendan semuanya adalah kaum Iban dan mereka adalah penduduk asal Sarawak. Terdapat dua guaman yang difailkan oleh plaintif. Defendan-defendan dalam guaman pertama adalah daripada RH Niga ('RHN') dan RH Anchum ('RHA') manakala dalam saman kedua adalah daripada RH Balang ('RHB'). Tuntutan plaintif dalam guaman tersebut adalah untuk satu deklarasi bahawa defendan-defendan tidak layak untuk kekal memiliki Lot 15 Daerah Tanah Tinjar ('Estet Bukit Limau') atau mana-mana bahagiannya; satu deklarasi bahawa defendan yang menduduki Estet Bukit Limau tanpa lesen atau persetujuan; satu deklarasi bahawa plaintif berhak mendapatkan semula milikan Estet Bukit Limau; satu injunksi bahawa defendan-defendan dihalang daripada memasuki, menduduki atau menceroboh Estet Bukit Limau; menuai, memotong atau membawa pergi mana-mana buah kelapa sawit atau tandan buah segar dari Estet Bukit Limau; menghalang, mengganggu, mencegah atau sebaliknya menjejaskan hak plaintif berkenaan Estet Bukit Limau, termasuk hak untuk memiliki Estet Bukit Limau untuk tujuan membangunkan Estet Bukit Limau kepada kawasan ladang sawit; dan menghalang, mengganggu, mencegah atau sebaliknya menjejaskan operasi daripada ladang kelapa sawit plaintif dan perkhidmatan sampingan di Estet Bukit Limau. Defendan menuntut balas terhadap plaintif untuk satu deklarasi bahawa plaintif atau ejen-ejennya atau pekerja-pekerjanya menceroboh secara salah tanah defendan-defendan yang dikatakan dalam kawasan yang dipertikaikan; satu injunksi menghalang plaintif daripada menceroboh secara salah atau daripada memasuki atau menggunakan atau menduduki tanah defendan yang dikatakan dalam kawasan yang dipertikaikan; dan ganti rugi.

Diputuskan:

(1) Untuk membuktikan tuntutan mereka untuk hak adat anak negeri ('HAAN'), defendan-defendan perlu berbuat demikian atas imbangan kebarangkalian. Seksyen 5(7) Kanun Tanah Sarawak ('Kanun') adalah sangat jelas, beban undang-undang untuk membuktikan HAAN terletak pada defendan-defendan yang memplid bahawa mereka mempunyai HAAN. Prinsip ini adalah selaras dengan peruntukan s 101 Akta Keterangan 1950 (lihat perenggan 12).

(2) Defendan-defendan tidak menjelaskan dan tidak memberikan apa-apa bukti kehadiran mereka dalam persekitaran MHYD. Malah selepas perlembagaan MHYD, hanya terdapat 12 rumah panjang yang disenaraikan dalam Jadual Kedua kepada pemberitahuan *warta* pada tahun 1951 yang diiktiraf mempunyai HAAN tetapi rumah panjang

defendan-defendan tidak berada dalam senarai tersebut. Senarai dalam Jadual Kedua tersebut mencatatkan status tiga rumah panjang tersebut kerana sekiranya rumah panjang tersebut tersenarai di jadual maka defendan-defendan semestinya boleh mencabar perlembagaan MHYD atau secara alternatif mereka boleh didengar dan/atau dinasihati oleh pegawai perhutanan dan mereka pasti menjadi salah satu dari 12 rumah panjang yang disenaraikan. Pada tahun 1951, defendan-defendan dalam segala kemungkinan tiada dalam persekitaran MHYD dan oleh itu mereka tidak mempunyai HAAN terhadap persekitaran tersebut. Atas imbangan kebarangkalian, plaintif berjaya membuktikan kes mereka terhadap defendan-defendan (lihat perenggan 30 & 35).

(3) Tuntutan telah diselesaikan sejak tahun 1951 apabila MHYD telah diwartakan di mana hanya 12 buah rumah panjang diiktiraf tetapi bukannya tiga buah rumah panjang tersebut. Defendan-defendan hanya mengetahui status MHYD pada tahun 1958 apabila mereka didakwa menduduki sekitar MHYD. Penduduk daripada 12 buah rumah panjang yang disenaraikan dalam Jadual Kedua dalam Pemberitahuan pada tahun 1951 semestinya telah memberitahu defendan-defendan dari rumah panjang mengenai MHYD ini. Penduduk di tiga buah rumah panjang sepatutnya mengambil langkah-langkah untuk mendaftar tuntutan mereka atau memulakan tindakan terhadap kerajaan atau Jabatan Tanah dan Ukur atau sebelumnya Jabatan Hutan pada tahun 1958 (lihat perenggan 31 & 47).

(4) Pada tahun 1993 apabila pajakan sementara dikeluarkan, defendan sepatutnya mengambil tindakan terhadap kerajaan tetapi tidak berbuat demikian. Apabila plaintif memulakan pembangunan Estet Bukit Limau pada tahun 1997, defendan-defendan dari rumah panjang semestinya telah melihat penanaman Estet Bukit Limau tetapi tidak membuat apa-apa aduan dengan plaintif dan tidak memfailkan apa-apa tindakan terhadap plaintif dan kerajaan mengenai tuntutan HAAN mereka. Tindakan defendan-defendan terhadap kerajaan sekiranya mereka menamakan kerajaan dalam tuntutan balas mereka, akan dihalang di bawah Akta Perlindungan Pihak Berkuasa Awam 1948. Tuntutan balas defendan-defendan terhadap plaintif juga dihalang oleh masa di bawah Ordinan Had Masa Sarawak (lihat perenggan 47).]

Cases referred to

Baltim Timber Sdn Bhd v Director of Forests & Ors [1996] 4 MLJ 103, HC (refd)

Bonham-Carter v Hyde Park Hotel [1948] WN 89; (1948) 64 TLR 177, KBD (refd)

Butrasemari Sdn Bhd v Tuai Rumah Pee Millo Anak Datu & Lim Khim Boon [2011] MLJU 366, HC (distd)

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali

& Co) v Public Bank Bhd [2014] 4 MLJ 465; [2014] 6 CLJ 269, FC (refd)
F Hoffmann-La Roche & Co AG and others v Secretary of State for Trade and Industry [1974] 2 All ER 1128, HL (refd)
Hamit bin Matusin v Superintendent of Lands and Surveys & Anor [2001] 3 MLJ 535, HC (refd)
Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427; [1990] 2 CLJ (Rep) 169, HC (refd)
Liew Yu Fatt v Teck Guan & Co Ltd [1966] 1 MLJ 87; [1965] 1 LNS 92 (refd)
Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 MLJ 794, CA (refd)
Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Divison & Anor [2005] 5 MLJ 305, CA (refd)
Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97; [1993] 2 CLJ 2283, SC (refd)
Punca Klasik Sdn Bhd v All persons in occupation of the wooden house erected on a portion of land held under grant No 26977 for Lot 4271 in the township of Johor Bahru, Johor and another action (No 2) [1996] 5 MLJ 92; [1995] 4 BLJ 337, HC (refd)
Rajang Plywood Sawmill Sdn Bhd v Jangkar Enterprise Sdn Bhd [2008] MLJU 377; [2013] BLR 57, HC (refd)
Sebekai Plantation Sdn Bhd v Superintendent of Lands and Surveys, Bintulu [2012] 4 CLJ 694, HC (refd)
Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1994] 3 MLJ 530; [1994] 4 CLJ 757, HC (refd)
Smith v East Elloe Rural District Council and Others [1956] 1 All ER 855, HL (refd)
TR Riggie anak Beluluk & 2 Ors v Land Custody and Development Authority & 2 Ors (Suit No 22–50 of 1996) (unreported), HC (refd)
TR Usah ak Lutong & Ors v Lembaga Tabung Haji & Ors [2013] 4 MLJ 578, CA (refd)
UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals [2009] 1 MLJ 737; [2009] 1 CLJ 329, FC (refd)
Wong See Kui v Hong Hin Tin Mining Co [1969] 2 MLJ 234; [1969] 1 LNS 202 (refd)

Legislation referred to

Evidence Act 1950 ss 101, 114(e)
Forest Ordinance 1934 (repealed by Forest Ordinance (Cap 126)) s 32
Forest Ordinance (Cap 126) ss 29, 35(6), 36, 37(d), 39
Prohibited Areas Ordinance
Public Authorities Protection Act 1948
Land Code (Cap 81) ss 5(1), (2), (7), 10(3), 28, 132
Limitation Ordinance (Cap 49) Schedule, Items 72, 97, 110, 112

Leonard Shim (Anastasia Chin with him) (Reddi & Co Advocates) for the plaintiff.
Harrison Ngau (Abun Sui with him) (Harrison Ngau & Co Advocates) for the defendants.

Mairin Idang JC:

INTRODUCTION

[1] There were two suits filed by the plaintiff. Suit MYY-22–12/6 of 2012 was filed on the 11 June 2012 ('the first suit') whilst Suit No MYY-22–24/8 of 2012 was filed on the 30 August 2012 ('the second suit'). The defendants in the first suit were from RH Niga ('RHN') and RH Anchum ('RHA') whilst those in the second suit were from RH Balang ('RHB'). On the 29 November 2012 the court ordered the first and second suits to be tried together. In this judgment I shall also refer the first and second suit as the said suits and RHN, RHA and RHB as the three longhouses.

[2] The plaintiff's claims in the said suits are as follows:

(a) a declaration that the defendants are not entitled to remain in possession of Lot 15 Tinjar Land District (subdivided into Lots 2, 3 (now known as Lot 22), 6 and 9 Block 32) ('Bukit Limau Estate') or any part thereof;

(b) a declaration that the defendants are in occupation of Bukit Limau Estate without licence or consent;

(c) a declaration that the plaintiff is entitled to recover possession of Bukit Limau Estate;

(d) an injunction that the defendants, whether by themselves, their servants or agents or otherwise howsoever be restrained from:

(i) carrying out the wrongful acts mentioned in para 7 of the statement of claim;

(ii) entering, occupying or trespassing on Bukit Limau Estate or any part thereof;

(iii) from harvesting, cutting or taking away any oil palm fruits or fresh fruit bunch from Bukit Limau estate;

(iv) hindering, interfering, preventing or otherwise affecting the plaintiff's rights in respect of Bukit Limau Estate, including the right to possession of Bukit Limau Estate for the purpose of developing Bukit Limau Estate into oil plantation areas; and

(v) hindering, interfering, preventing or otherwise affecting the plaintiff's operation of an oil palm plantation and ancillary services on Bukit Limau Estate.

(e) damages;

(f) interest;

(g) costs; and

(h) further or other relief as this honourable court deems fit and proper.

[3] There is also a counterclaim by the defendants against the plaintiff for the following:

(a) a declaration that the plaintiff or its agents or servants are wrongfully trespassing on the defendants' said land within the disputed areas;

(b) an injunction restraining the plaintiff or its agents or servants from wrongfully trespassing or from entering or using or occupying the defendants' said land within the disputed areas;

(c) damages to be assessed;

(d) costs;

(e) interests; and

(f) such further or other order or relief deems fir and proper by the honourable court.

[4] The following documents were marked:

The plaintiff documents		
(i)	Bundle of pleadings	BOP
(ii)	Plaintiff's bundle of documents	PBOD1
(iii	Plaintiff's supplementary bundle of documents	PBOD2
(iv)	Plaintiff's further supplementary bundle of documents	PBOD3
(v)	Plaintiff's further supplementary bundle of documents (II)	PBOD4
(vi)	Plaintiff's further supplementary bundle of documents (III)	PBOD5
(vii)	Plaintiff's further supplementary bundle of documents (IV)	PBOD6
(viii)	Plaintiff's further supplementary bundle of documents (V)	PBOD7
(ix)	Plaintiff's further supplementary bundle of documents (VI)	PBOD8
The defendants documents		
(i)	Defendants' bundle of documents	DBOD1

(ii)	Defendants' documents	supplementary	bundle	of	DBOD2
(iii)	Defendants' documents	supplementary	bundle	of	DBOD3
(iv)	Defendants' documents	supplementary	bundle	of	DBOD4

[5] The agreed facts are as follows:

(a) the plaintiff had been issued with the Provisional Lease Lot 15 Tinjar Land District for approximately 4827 hectares on the first April 1996 which had been sub-divided into Lots 2, 3 (now known as Lot 22), 6 and 9 of Block 32;

(b) the defendants are all Ibans and they are natives of Sarawak;

(c) the plaintiff's provisional lease is within the 'Lemiting Protected Forest' *Gazette* under Sarawak Government *Gazette* No 881 dated 1 August 1951 which came into effect on 15 September 1951; and

(d) the area claimed by the defendants in this suit is shown on the map at p 1 of DBOD to be under NCR is within the 'Lemiting Protection Forest'.

[6] Both the plaintiff and defendants have agreed on the list of agreed issues for trial which I have marked as AI. But what then is the position of agreed issues. In *Rajang Plywood Sawmill Sdn Bhd v Jangkar Enterprise Sdn Bhd* [2008] MLJU 377; [2013] BLR 57 where His Lordship Datuk David Wong (now JCA) had this to say on agreed issues: [6] '... the parties through their counsels had given the court a set of agreed facts and agreed issues in encl 98. The legal effect of encl 98, in my view, is that the parties are bound by what they have stated there and the court must in turn base its decision on what have been agreed as to the facts and issues'. I am in agreement with that statement of His Lordship. There was some disagreement highlighted in the parties' submissions on issue No 6 whether it was agreed or not but the fact remains the list of agreed issues was marked by the court as 'A1' and when issue No 6 was added therein it can only mean that it was intended to be agreed issue No 6. The numbering of the agreed issues were also not in sequence since there was No 4. The agreed issues are now numbered as follows:

(1) whether as registered proprietor of Lot 15 Tinjar Land District (subdivided into Lots 2, 3 (now known as Lot 22), 6 and 9 of Block 32), the plaintiff has an indefeasible title by reason of the statutory provision of the Land Code including s 132 of the Land Code (Cap 81)?

(2) whether the said defendants by themselves or their servants or agents have wrongfully, without permission or consent of the plaintiff entered part of the said lands namely Lot 15 Tinjar Land District (subdivided into Lots 2, 3 (now known as Lot 22), 6 and 9 of Block 32) ('Bukit Limau Estate'); and

(a) harvested and continue to harvest and take away fresh fruits bunches from Bukit Limau Estate;

(b) prevented and still prevents the staff and workers of the plaintiff company from entering, maintaining, taking care and harvesting the oil palm fruits within the Bukit Limau Estate;

(c) erected blockades at several areas in Bukit Limau Estate and prevented and still preventing the plaintiff's workers from entering those areas; and

(d) threatened the plaintiff's workers from harvesting on Bukit Limau estate and posted signs on the oil palm trees warning the plaintiff's workers not to harvest or harm will be done.

(3) whether the said defendants have wrongfully remained in possession and/or wrongful occupation of the Bukit Limau Estate and thereby trespassing on Bukit Limau Estate?

(4) whether the plaintiff have been deprived of the use and enjoyment of Bukit Limau Estate or part(s) thereof and has suffered loss and damage?

(5.1) whether the defendants from Rumah Niga and Rumah Anchum under Suit No MYY-22–12/6 of 2012 and the defendants from Rumah Balang under Suit No MYY-22–24/8 of 2012 ('the said defendants') are occupying the land within the boundary of the provisional lease of Lot 15 Tinjar Land District?

(5.2) if the answer to issue No 5.1 is yes, whether the defendants have lawfully acquired NCR over the land within the boundary of the provisional lease of the plaintiff over Lot 15 Tinjar Land District and/or that they occupied the land therein with the consent or permission of the government?

(6) whether the defendants' counterclaim is barred by items 72, 97, 110 and/or 112 to the Schedule of the Sarawak Limitation Ordinance.

[7] The plaintiff had called nine witnesses and they were Azahari Omar

('PW1'), Bujang bin Radin ('PW2'), Zulkiffli bin Wan Ibrahim ('PW3'), Shamsulbahri bin Mohamad ('PW4'), Luke Khiu Khon Sen ('PW5'), Noor Ikmal Naim bin Ismail ('PW6'), Mohd Alifsham bin Samat ('PW7'), Bibi Umizah Osman ('PW8') and Galau Upau ('PW9').

[8] The defendants had also called 11 witnesses and they were Peter Remun ak Anthony Jram ('DW1'), Empaga ak Balan ('DW2'), Insom ak Uban ('DW3'), Francis Ubi Tau ('DW4'), Abell Jalong ('DW5'), Mark Bujang ('DW6'), Nicholas Bawin ak Anggat ('DW7'), Adi ak Ajo ('DW8'), Party ak Ujed ('DW9'), Budin ak Nawek ('DW10') and Edwin Dundang Bugak ('DW11').

[9] From the parties' pleadings, the documents and submissions the subject land is within the Lemiting Protected Forest ('LPF') which part of it had been excised out and a provisional lease ('PL') issued to the plaintiff. The plaintiff had fully planted the said PL with oil palm trees which the plaintiff referred to as the Bukit Limau Estate ('BLE'). The plaintiff have been harvesting the fresh fruits bunches ('FFB') for 17 years when the defendants from the three longhouses have also entered the BLE and harvested FFB therein as their source of income. Hence the suits herein were filed in 2012. The defendants have counterclaimed and asserted they have entered and harvested FFB on land which is outside the PL which they called the disputed land. The evidence also showed the defendants are claiming the said PL as their Native Customary Rights ('NCR'). I think I can summarise the issues into (1) defendants' claim of NCR over the PL/BLE (2) indefeasibility of title (c) statutory limitation and (4) trespass. For the purpose of this judgment I shall also refer to LPF, PL and BLE interchangeably in this judgment.

THE DEFENDANTS CLAIM OF NCR

[10] Now I shall address the issue of NCR. I call this the mother of all the issues. I therefore think the determination of this claim of NCR would dispose of the suits. But let me also reassert that the defendants who are all natives, they being of the Iban race though entitled to claim NCR must do so by proof of their claims over the PL/BLE. The history of the LPF, the issuance of the PL and respective three longhouses and their status would also help to support the defendants' NCR claims.

[11] It was in 1994 that approximately 4827 hectares were excised out from the Lemiting Protected Forest (LPF) pursuant to s 39 of the Forest Ordinance (Sarawak Cap 126) which was published in the Sarawak *Gazette* No 4555 on 23 November 2000 (p 25 NOP and ex P3). This excised area was then issued with PL Lot 15 to Lembaga Pembangunan dan Lindungan Tanah (p 45 of PBOD). Then in 2009 another PL was issued after its subdivision (pp 48–52

of PBOD1). In 2012 a new PL Lot 22 was issued to the plaintiff (p 53 of PBOD1).

[12] Now to proof their claims for NCR the defendants must do so on a balance of probability. Section 5(7) of the Sarawak Land Code ('the SLC') is very clear, the legal burden to establish NCR lies with the defendants who pleaded that they have NCR over the PL/LPF claimed by them herein. This principle is consistent with the provisions of s 101 of the Evidence Act 1950 (Act 56) which reads:

> (1) Whoever desires any court to give judgment as to any legal right orliability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[13] I think the pertinent question to be asked is what then would be the status and/or the implication of the defendants' claim of NCR over a land which had been declared as LPF in 1951 under the then Forest Ordinance 1934 ('the FO 1934') which was replaced by the Forest Ordinance 1958 ('the FO 1958'). There is also the need to consider the status of the defendants' claim of NCR under the SLC. We therefore have to read the relevant provisions of the FO 1934 and 1958 on the status of a protected forest and the provisions of the SLC since part of the LPF was subsequently excised out in 1994 for the purpose of the issuance of the PL in 1996.

[14] In order to understand and decide whether the defendants have proven their NCR claims, I must therefore go back to history and year 1951 is very significant to this case. It was that year the 'Lemiting Protected Forest' was constituted under *Gazette* Notification Sarawak No 881 dated 1 August 1951 which came into effect on 15 September 1951 ('the *Gazette* Notification') which stated: 'In the exercise of the powers conferred on the chief secretary by s 29 of the Forest Ordinance, the acting chief secretary hereby constitutes the land enclosed within the boundaries described in the First Schedule hereto a Protected Forest with effect from 15 September 1951 subject to the rights admitted, privileges conceded and special conditions governing the protection thereof specified in the Second schedule hereto'. The area of the said Lemiting Protected Forest is described under the First Schedule of the *Gazette* Notification Sarawak No 881 as per the forestry's map at p 3 PBOD7.

[15] When the exercise under s 29 was completed, there were 12 longhouses listed in the *gazette* notification and they were: (a) Kampung Uma Bawang; (b) Kampung Long Miri; (c) Kampung Long Pilah; (d) Kampung Long Tru; (e) Kampung Long Belingan; (f) Kampung Long Tuyut; (g) Kampung Long

Lejang; (h) Kampung Long Jegan; (i) Kampung Long Persungai; (j) Kampung Rumah Belulok, Sungai Nat, Tru; (k) Kampung Penghulu Entri, Sungai Tru; and (l) Kampung Rumah Abang, Sungai Tru. Though the Sarawak government had recognised the rights of the 12 longhouses to farm their secondary forest (temuda) it was also an offence to clear high forest except with the authority of the Conservator of Forests.

[16] How was the LPF constituted in 1951 under the FO 1934 and the determination on NCR claims. The FO 1934 contained provisions for the constitution of a protected forest, the procedures for doing so, the effect of notification, claims of rights and privileges and the enquires into such claims. Let me reproduce the relevant provisions of the FO 1934:

Section 4

Whenever it is proposed to constitute any land a forest reserve there shall be published in the Government Gazette a notification which shall —

(a) Specify as nearly as possible the situation and limits of such land; and

(b) Declare that it is proposed to constitute such land a forest reserve.

Section 5

(1) When a notification has been published under section 4 the Resident shall issue a proclamation in English and Malay, and in such other language as in a particular case may be desirable.

(2) The proclamation shall be published in convenient places in the neighbourhood of the land which it is proposed to reserve, and such other places as the District Officer may deem expedient, and shall be substantially in the form set out in Schedule III.

(3) Any person who wishes to make any claim in respect of, or in connection with, the land proposed to be reserved shall, within a period to be stated in the proclamation, which shall not be less than three months, give particulars of such claim either verbally or in writing to the District Officer.

Section 7

(1) At the expiration of the period prescribed by the proclamation, the District Officer shall proceed to hear and determine any claims which have been made under section 5(3) and shall give notice to the claimant and to the Conservator of Forests or his deputy of the date of hearing.

(2) He shall record the proceedings in writing, and may compel the attendance of witnesses and the production of documents.

(3) Having heard and recorded any objections which the Conservator of Forests or his deputy may make, the District Officer shall make and order admitting or disallowing such claims as he deems fit, and shall thereupon forward to the Resident a statement of his decisions.

(4) Any person aggrieved by a decision of the District Officer may, within fourteen days, appeal to the Resident.

Section 8

(1) Having heard any appeals, and given his decision thereon, the Resident shall consider the remaining decisions of the District Officer, and, if he deems fit ratify them, and shall then forward to the Conservator of Forests a statement of all claims that have been admitted.

(2) The Conservator of Forests shall prepare a schedule of all claims which shall be attached to the notification under section 12.

Section 12

(1) When the period fixed under section 5(3) has elapsed and all objections and claims, if any, have been disposed of, and all lands, if any, to be included in the forest proposed for reservation have been acquired by the Chief Secretary under section 10, the Chief Secretary shall publish in the Government Gazette a notification which shall —

(i) specify the limits of the forest it is intended to reserve;

(ii) declare the same to be reserved from the date fixed by such notification;

(iii) state the rights admitted and privileges conceded in respect of the said forest; and

(iv) state the special conditions, if any, governing the reservation thereof.

(2) From the date so fixed, such forest shall be a forest reserve and shall together with all the produce thereof and things found therein, be deemed to be the property of the government and shall be maintained and controlled by the Conservator of Forests, subject to the rights, privileges, and conditions, if any, stated in such notification.

Section 19

Notwithstanding anything herein contained, no right admitted, or privilege conceded under section 8, shall be transferred by way of grant, sale, lease, mortgage or otherwise, except with the authority of the Chief Secretary.

Section 25

The Chief Secretary may constitute any Crown land a protected forest in the manner hereinafter provided.

Section 26

Whenever it is proposed to constitute any land a protected forest, the Resident shall publish a proclamation in the manner prescribed in section 5.

Section 27

The District Officer shall make all necessary inquires, into the titles and claims put

forward, in the manner prescribed in section 7.

Section 28

The Resident shall then proceed in accordance with the provisions of section 8.

Section 29

(1) When the period prescribed by the proclamation had elapsed and all objections and claims, if any made within such period have been disposed of, the Chief Secretary shall published in the Government Gazette, a notification which shall:

(a) Described the limits of such forest; and

(b) State the rights conceded and any special conditions attached.

(2) From the date so fixed the forest shall be protected forest and shall be maintained and controlled by the Conservator of Forests, subject to the conditions of section 33 and any rights or privileges admitted in the notification.

Section 31

The Resident shall, before the date fixed by the notification under section 29, cause the contents of the said notification to be published in the places in which the proclamation under section 26 was published.

Section 32

Subject to the provisions of section 33, no person shall, in a protected forest, do any of the following things namely;-

(a) Clear any land for farming or any other purpose or erect any building; or

(b) Fell, cut, burn or remove any timber, firewood or charcoal, except under a licence or permit issued under the authority of the Conservator of Forests;

(c) Take or remove any other forest produce mentioned in schedule II except under the terms of a license or permit; or

(d) ...

Section 35

(1) The Chief Secretary may by notification in the Government Gazette direct that from a date to be fixed by such notification any protected forest or any portion thereof shall cease to be protected.

(2) From the date so fixed such protected forest, or portion thereof shall cease to be protected but the rights if any, which have been extinguished therein shall not revive.

[17] But then the FO 1934 was subsequently replaced by the FO 1958 which came into effect from 1 January 1954. To me the FO 1958 is now the applicable law for all protected forest which includes the LPF. In fact the

revocation of part of the LPF in 1994 was done under s 39 of the FO 1958. I should therefore reproduce the relevant provisions:

> Exercise of subsisting rights, etc
>
> Section 35(6) — Notwithstanding anything herein contained, no subsisting rights or privileges in a protected forest shall be transferred by way of grant, sale, lease, mortgage or otherwise, except with the written approval of the Minister.
>
> Revocation of protected forest
>
> Section 39(1) — The Minister may, by notification in the Gazette, direct that, from a date to be fixed by such notification, any protected forest, or any portion thereof, shall cease to be protected.

[18] My reading of both the FO 1934 and 1958 respectively show similar procedures required for constituting a protected forest such as the requirement of notification in the government *gazette*, issuance of a proclamation in English and Malay or other languages which must be published in convenient places within the vicinity of the proposed protected forest or as the district officer deemed expedient. The whole idea is to give notice to any persons to make any claims especially where their NCR claims are or would be affected by the intended protected forest. There would then be inquiries held to determine the claims submitted. Any aggrieved claimants are also allowed to appeal. Both FO 1934 and 1958 also provide for the cessation or revocation of protected forest.

[19] I also think a discussion is necessary on the relevant provisions of the SLC on the issuance and status of the PL and the implication on the NCR claims as well as the subsisting rights and privileges. The relevant provisions are reproduced herewith.

> Section 2
>
> 'Native Customary Land' means —
>
> (a) land in which native customary rights, whether communal or otherwise, have been lawfully created prior to the first January 1958 and still subsist as such;
>
> (b) ...
>
> (c) Interior area land upon which native customary rights have been lawfully created pursuant to a permit under section 10;
>
> 'Interior Area Land' means land not falling within any of the definitions of Reserved Land, Native Customary land, native area land or Mixed Zone Land
>
> 'Reserved land' means land —
>
> (a) ...

(b) Comprised within a National Park constituted under the National park and Nature reserves Ordinance 1988 (Cap 27) or within a Forest Reserve, Protected Forest or Communal Forest constituted under the Forest Ordinance cap 126 (1958 Ed).

Section 5

Native customary rights

(1) As from the first day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the first day January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be unlawful occupation of State land and section 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are —

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

Provided that

(i) until a document of title has been issued in respect thereof —

(a) no rent shall be charged by the Government on the land which shall continue to be State land; and

(b) any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and his rights over the land may, upon the date of coming into force of this paragraph, be inherited, acquired or purchased by or transferred or sold or disposed of to or dealt with another native; and

(ii) the question whether any such right has been acquired or has been lost or terminated shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the first day of January, 1958.

Section 10

Occupation of different classes of Land

(1) without prejudice to section 5(2)(e) or to section 29 or to the provisions of any written law, no person may occupy or exercise any rights or privileges over any Mixed Zone land or Native Area land save under a valid and subsisting document of title and, if the land in question is un-alienated, any occupier thereof shall be deemed to be unlawful occupation of State land and section 209 shall apply thereto.

(2) No person whether a native or non-native may occupy any native Customary Land or any Reserved Land save under and in accordance with the conditions applicable thereto by virtue of this or any other written law, any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

(3) Without prejudice to any law for the time being regulating the prospecting for minerals and mineral oils or the taking of forest produce, any native who, without a prior permit in writing from the Superintendent, occupies any Interior Area Land or fells or attempts to fell virgin jungle upon any such land or attempts to create customary rights upon any such land shall be guilty of an offence: Penalty, in the case of the first offence, a fine of one thousand ringgit and, in the case of second or subsequent offence, imprisonment for two years and a fine of five thousand ringgit.

(4) The occupation of Interior Area Land by a native or native community without a permit in writing from a Superintendent shall not, notwithstanding any law or custom to the contrary, confer any right or privilege on such native or native community and, in any such case, such native or native community shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

(5) The consent of a Superintendent for the purposes of any permit shall not be given if he considers either that he would thereby prejudice the individual or communal rights of others or that he would thereby prejudice the interests of Sarawak or its inhabitants in the area where the land applied for is situate.

(6) ...

(7) ...

Section 28

Survey required before alienation

(1) No State land shall be alienated under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent:

(2) Provided that, when the immediate survey of any State land is impracticable, the Superintendent may order that a provisional lease in Form C in the First Schedule be executed in favour of the person entitled.

(3) Every provisional lease shall specify the approximate extent and area of the land included therein but shall not entitle the holder to a grant or lease of the whole of the area specified.

(4) Notwithstanding the payment by him of any rent in respect of the area stated, the registered proprietor of any provisional lease shall have no right to registration of a lease in Form B in the First Schedule for an area equal to the area stated to be alienated if on survey such area is found not to be available.

(5) Save where the context otherwise requires, this Code in connection with leases shall apply to provisional leases and references to a lease shall include a provisional lease.

[20] Having reproduced the relevant provisions of the FO 1934 and 1958 and the SLC, let us now consider whether the defendants have a valid NCR claim on the lands they claim to be within the PL. The plaintiff have summed up: '... the Lemiting Protected Forest constituted by the *gazette* notification No 881 of first August 1951 is valid and in force as the defendants of the First Suit and also the Second Suit have never challenged the said Lemiting Protected Forest *Gazette* Notification nor have they applied to have such Lemiting Protected Forest *Gazette* Notification made pursuant to s 29 of the Forest Ordinance be set aside in the court of law'.

[21] The plaintiff also submitted the defendants of the first suit had not called evidence to prove their case and that only the defendants of the second suit had done so. The plaintiff's submitted that when the LPF was constituted in 1951 only 12 longhouses were listed in the Second Schedule but not the three longhouses. PW1 the Pemelihara Hutan testified that the records with his Department showed that the three longhouses were not listed to have the rights to farm their temuda see pp 22–23 NOP). PW9 also testified that there were no RHB, RHN and RHA in 1951 according to the records of the Lemiting Protected Forest *Gazette* (Q&A 6, 7 and 12 WSP9). The plaintiff asserted that the defendants could not just proclaimed to have NCR over the PL when in the first place they were not in existence when the LPF was constituted in 1951.

[22] The plaintiff also submitted that even those listed 12 longhouses and their descendants were not allowed to claim more areas or to plant more trees as what had been provided under the proviso to the Second Schedule. The plaintiff had referred to the case of RH Riggie (descendants of Rumah Beluluk which was listed amongst the 12 longhouses) who in 1996 had sued and claim for more area where the high court recognised only those residents of the 12 longhouses named therein in the second Schedule as having the rights to cultivate their temuda with rubber and fruit gardens but that they were 'not to fell trees and no more trees to be planted' by the residents of the 12 longhouses (see *TR Riggie anak Beluluk & 2 Ors v Land Custody and Development Authority*

& 2 Ors Suit No 22–50 of 1996 (unreported). A

[23] It was also the plaintiff's submission that the LPF having been *gazetted* as the LPF was categorised as 'reserved land' under the SLC as defined in s 2(b): 'comprised within a National Park constituted under the National Park and Nature reserves Ordinance 1988 (Cap 27) or within a Forest Reserve, Protected Forest or Communal Forest constituted under the Forest Ordinance Cap 126 (1958 Ed)'. As such no NCR could exist or be claimed against reserved land. B

[24] The plaintiff also submitted that the defendants have never challenged or set aside the said Lemiting Protected Forest *Gazette* Notification and only filed their claim on their NCR over the said PL by way of a counterclaim to the suits. The plaintiff submitted the failure to challenge the Sarawak government and the Director of Forest is detrimental to the defendants on their claims of NCR. The plaintiff had relied on *Smith v East Elloe Rural District Council and Others* [1956] 1 All ER 855; *F Hoffmann-La Roche & Co AG and others v Secretary of State for Trade and Industry* [1974] 2 All ER 1128; *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737; [2009] 1 CLJ 329; *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97; [1993] 2 CLJ 2283 and *TR Riggie anak Beluluk & 2 Ors v Land Custody and Development Authority & 2 Ors* Suit No 22–50 of 1996 (unreported). C D E

[25] The defendants have not disputed that they came to settle in their present settlement areas after the LPF was constituted in 1951. The maps also showed that the three longhouses are outside the PL as shown in the Forestry Department Map (p 3 of PBOD7) and Bukit Limau Estate Long House Coordinate (GPS Reading) (p 1 PBOD2). The defendants however submitted that they are in occupation of their *pemakai menoa* or the *antara/garis menoa* of their longhouses in 1958. The defendants also contended that their occupation of their present settlements was with the permission or consent of the government or that they had relied on the representation, encouragement and assurance of the officials authorised or employed by the government, namely the then District Officer of Baram, Mr Mesporan, the then section forest officer, Mr Wood and the late Pemanca Entri who was the Iban community leader for the Baram/Tinjar area in 1958. The defendants had referred to the letter dated 30 June 1975 written by the late Anthony Jiram who was the Sarawak Administrative Officer ('SAO') and the letter dated 23 June 1975 by Pemanca Entri to support their NCR claims (see pp 2–4B of DBOD1). F G H I

[26] According to the defendants the conducts of Mr Mesporan and Mr Wood as stated in the said letters were acts done in their official capacity in permitting the people of RHB (then known as Rumah Unang) to move to their present *pemakai menoa*. It was therefore urged upon the court should presume

such conduct as regularly done under s 114(e) of the Evidence Act 1950.

[27] The defendants also submitted that based on the adat or customs and practices of the Ibans they were not permitted to move out from their previous longhouse and build a new one without the permission of the district officer or the *penghulu* of their area as to do so they would not only be fined but their leader would not be recognised as their chief or headman (*tuai rumah*) of their longhouse.

[28] The defendants further contended that despite their unlawful occupation of their land in their pemakai menoa area within the LPF, the government had not taken any action against them. They also asserted that they are paying assessment rates to the Marudi District council for the houses within their present *pemakai menoa* as such the government recognises their occupation of their land.

[29] Here is my take on the rights of the defendants' over their alleged NCR claims. At the outset I have to say the defendants in the first suit (RHN and RHA) had not led evidence on their claims of NCR or at all. However the defendants in the second suit amongst others, had called DW1, DW2, DW9 and DW11 to testify. Now from the superimposed map at p 2 PBOD1 the areas claimed by the defendants (RHB) in the second suit are coincidently of the same areas as those planted by plaintiff within the PL/BLE. DW2 said the defendants of RHB are farmers and gardeners and had planted paddy, oil palm trees and rubber trees and fruit trees there in the 1990s (lines 5125–5135 p 283 and lines 5342–5248 pp 291–292 NOP). But the defendants had not led evidence where the areas were in the LPF. DW2 also said the defendants of the second suit had built their longhouses there in the 1980s (see line 5459–5466 p 296 NOP). DW2 however agreed that no permit or letter was issued by the Lands and Surveys Department recognising their claim of NCR within the PL (lines 5544–5547 p 299 NOP).

[30] But most importantly have the defendants proven their claim for NCR over the LPF/PL/BLE? I must now look at the status of the land pre 1951. Who were the natives found within the vicinity of the LPF then? Where were the defendants in 1951 when the land was constituted as the LPF? The defendants have not explained and not provided any evidence of their presence within the vicinity of the LPF. In fact after the constitution of the LPF there were only 12 longhouses listed in the Second Schedule to the *gazette* notification in 1951 that were recognised as having NCR but the defendants' three longhouses were not in the said list. To me the said list in the Second Schedule speaks volume of the status of the three longhouses because had they been there the defendants would have definitely challenged the constitution of the LPF or alternatively they would have been heard and/or consulted by the forestry officer and they

would definitely be amongst those 12 longhouses listed. In fact the letter dated 3 July 1968 written by JR Palmer, the section Forest Officer, Miri stated that there were no records of the three longhouses in 1951 (p 1 PBOD7). It is my finding that in 1951 the defendants in all probability were not within the vicinity of the LPF and as such they did not have NCR over the same.

[31] The defendants admitted that they came to the LPF in 1958. Could they then in 1958 claim NCR over the lands within the LPF? The answer is again no because all the claims were already settled way back in 1951 when the LPF was *gazetted* where only 12 longhouses were recognised but not the three longhouses. PW2 testified that when the LPF was constituted all NCR land had been excluded (line 959–964 p 53 NOP). The FO 1958 would also not allow the defendants to create NCR within the LPF as to do so would contravene s 36 of the FO 1958 which states: ' ... no person shall in the protected forest — (a) erect any building, or clear, or break up any land for cultivation or for any other purpose; (b) fell, cut, ring, mark, lop or tap any tree, or injure by fire or otherwise any tree, or remove timber, firewood or charcoal; (c) take or remove any other forest produce; (d) pasture cattle or permit cattle to trespass; (e) cause any damage by negligence in felling any tree or cutting or dragging any timber; (f) quarry stone, burn lime or charcoal or search for minerals; (g) kindle, keep or carry any fire or leave any fire burning; or (h) commit any act of trespassing'.

[32] But the defendants submitted that Mr Mesporan the Distrcit Officer of Baram and Mr Wood, the section forest officer permitted them to settle at their pemakai menoa within the LPF. Yet the defendants had not produced evidence of such written permit or approval given by Mr Mesporan and Mr Wood. All that the defendants have were the two latters dated 30 June 1975 and dated 23 June 1975 purportedly written by Anthony Jiram and Pemanca Entri respectively as proof of what Mr Mesporan had said. DW1, DW9 and DW11 had referred to the two letters but with respect these were not permit under s 10(3) of the SLC issued by the Lands and Surveys Department or that there were approval given by the Forest Department. DW11 had not led any evidence to prove that Mesporan had the authority and power to direct RH Unang to move to Sungai Tuyut and establish NCR therein bearing in mind that under s 37(d) of the FO 1958 only the Conservator of Forests/Director of Forests have the power to do so in writing. We also have to bear in mind s 32 of the FO 1934 and s 36 of the FO 1958 respectively prohibit the defendants from doing any things inside the forest protected areas.

[33] The defendants' submission was that they were within the LPF in 1958 as such their claim of NCR would have to be proven as provided for under s 5(1) and (2) of the SLC (see *Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri*

Divison & Anor [2005] 5 MLJ 305 at pp 314–315 (CA) and *Hamit bin Matusin v Superintendent of Lands and Surveys & Anor* [2001] 3 MLJ 535). But for the creation of NCR over interior area land under s 5(1) and (2) of the SLC, permits under s 10(3) of the SLC are essential, which the defendants had not produce any. But then again interior area land also excludes 'reserved land' therefore no permits under s 10(3) could be issued for land within a 'forest reserve' or 'protected forest' which comes within the term 'reserved land': *TR Usah ak Lutong & Ors v Lembaga Tabung Haji & Ors* [2013] 4 MLJ 578 (CA). Again it is my finding that the defendants have not established any NCR over the said PL. The defendants cannot do so because of the status of the LPF which was already a protected forest since 1951 and when a portion of it was excised out for the PL it continued to be free of any NCR claims. The claims of NCR were already settled in 1951.

[34] In fact any intrusions into the LPF were seriously taken. PW9 gave evidence that the District Officer Edwin Dundang had on the 9 April 1997 issued a warning letter to his grandfather Medit Ali for allowing Iban nomad (Kampar) from Lubuk Mulong/Tanjung Mulong to farm and cultivate the land jointly with the Penan community without permission of the said district officer as this was against the Prohibited Areas Ordinance and the Lemiting Protected Forest *Gazette* Notification (see lines 4162–4211 pp 235–236 NOP). PW9 also said the Section Officer of the Forest Department Miri via a letter dated 15 February 1971 (p2 of PBOD7) had warned against the illegal occupation within the LPF. I think it was also not permissible under s 35(6) of the FO 1958 to transfer subsisting rights or privileges in a protected forest by by way of grant, sale, lease, mortgage or otherwise, except with the written approval of the Minister.

[35] To me the defendants do not have NCR over the PL/BLE. The defendants have failed to prove on a balance of probability that they have NCR over the said PL. The evidence do not support the defendants' claims or at all. As I have alluded to above the defendants have not shown that they were within the vicinity of the LPF in 1951. The NCR claims were in fact already settled in 1951 when the LPF was constituted. The 4728 hectares of land that was issued with PL was unencumbered land and/or free of NCR claims since it was constituted in 1951. It is also my view that when the defendants came to settle within the vicinity of the LPF in 1958 they could also not create, claim or assert NCR (*pemakai menoa*) on the LPF/PL/BLE because of the status of the LPF under the provisions of the FO 1958. Likewise similar prohibition also applied on the defendants' alleged NCR claims on the PL. I have also addressed this issue in my discussion on the status of a protected forest and claims of NCR under the SLC above. Since it is my finding that PL is unencumbered land and as there is no valid NCR claims in existence I find that on a balance of probability the plaintiff has proven their case against the defendants. Since I

have found for the plaintiff the defendants' counterclaim is also dismissed.

[36] For the purpose of completion I will now address the issue of the indefeasibility of the PL and whether the defendants' counterclaim is barred by Items 72, 97, 110 and/or 112 to the Schedule of the Sarawak Limitation Ordinance and that the defendants have trespassed the PL/BLE and caused loss and damage to the plaintiff.

INDEFEASIBILITY OF THE PL

[37] The proviso to s 28 allows the execution of a PL in Form C in the First Schedule where the immediate survey of any state land is impracticable. A PL is also a document of title (see *Sebekai Plantation Sdn Bhd v Superintendent of Lands and Surveys, Bintulu* [2012] 4 CLJ 694). I am of the view that the doctrine of indefeasibility of title applies to the PL because I have ruled that there is no NCR claims over the same.

[38] But the defendants submitted the PL is only provisional which the *Black's Law Dictionary* defined as 'temporary' or 'conditional', that the holder would not be entitled to the whole area specified in that the PL and the registered owner of PL has no right to a lease for an area equal to the area stated to be alienated if on survey such area is found not to be available (see s 28 of the SLC). The defendants also submitted the PL was issued subject to 'Restrictions and special conditions' such as 'upon the completion of a proper survey the holder of this provisional lease will be given a lease in accordance with the provisions of the Land Code ...' and 'The holder of this provisional lease shall not be entitled to a lease of an area equal to the area above stated but only to such and area as the survey shows to be available'.

[39] The defendants also submitted that the status of a PL had been dealt with and settled by the courts. They had referred to the case of *Butrasemari Sdn Bhd v Tuai Rumah Pee Millo Anak Datu & Lim Khim Boon* [2011] MLJU 366 where His Lordship Zulkifli bin Bakar J held: 'I now rule that the plaintiff has not proven the case on balance of probability, inter alia, on the grounds that: (a) the action by the plaintiff herein is based on the PL which is uncertain of the area they are claiming for; (b) the plaintiff should have gotten from the authority the exact area and location after the final survey is done; (c) the plaintiff should have named the Lands and Surveys Department as a party to this action so that the issue of the exact location and area of the land can be determined and decided at this trial'.

[40] It is the plaintiff's submission that the case of *Butrasemari Sdn Bhd* is distinguishable on its facts because in the present case the plaintiff had called nine witnesses including surveyors to give evidence on the area of the PL. PW2

is from the Lands and Surveys Department whilst PW5 a licensed surveyor had given evidence of the area of the PL. PW5 said most of the PL had been surveyed. The survey map of the PL at p 1 of PBOD8 was prepared technically based on a combination of survey datas from Lands and Surveys Department Miri (lines 2820–2827 p 155 NOP). PW2 said in evidence that the location of the PL as stated in the Lands and Surveys department Miri map (p 1 of PBOD4) was based on the description of the boundary that was issued to the plaintiff.

[41] I have read the case of *Butrasemari Sdn Bhd* the court there heard only two witnesses for the plaintiff and five from the defendant. The learned judge there ruled that the action by the plaintiff was based on the PL which was uncertain of the area. However it was not in evidence whether any of the witnesses in that case were surveyors or that they were from the Lands and Surveys Department unlike in the present case where PW5 a licensed surveyor and there was PW2 who was from the Department of Lands & Surveys who had given evidence that the location of the PL as stated in the Lands and Surveys Department Miri map (p 1 of PBOD4) was based on the description of the boundary that was issued to the plaintiff.

[42] The present case is also distinguishable because the PL showed that there were already pockets of NCR land excised out from the whole of the PL belonging to the penan communities under Tuai Rumah Galau Pau (P9) but not the defendants' NCR as there was none in the first place. The plaintiff have also adduced evidence of: (a) the Forest Department Map (p3 of PBOD7) showed the RHB to be outside of the PL; (b) the Map by the Department of Lands and Surveys Miri (p1 of PBOD5) showed the datas and areas of the PL taking into account the penan community recognised NCR; (c) the Map by the Licensed Surveyor (p 1 of PBOD8) where it was shown most areas of the PL have been surveyed and plotted based on datas from the Lands and Surveys; (d) the map by the plaintiff of Bukit Limau Estate (Longhouse coordination) showing the areas which have been planted and developed into oil palm plantation (p 1 of PBOD2) is within the PL base on GPS reading and RHB is outside the PL; and (e) the superimposed map by the licensed surveyor ('PW5') (p 2 of PBOD8) consisting the licensed surveyed map, the map of the defendants of RHB and the Bukit Limau Estate (Long House Coordination) Map showed RHB is outside the PL.

[43] I therefore agree with the plaintiff and with respect the case of *Butrasemari Sdn Bhd* is of no help to the defendants. Moreover in the present case it is my judgment that the defendants have no NCR claims since the history of the said PL showed that it was initially constituted the LPF in 1951 and excised out in 1993 for the issuance of the PL to the plaintiff. The law is very clear that no NCR could be established on a Protected Forest under the

FO 1934 and FO 1958 respectively. Further for claim of NCR after 1958 the defendants would have to comply with the provisions of the SLC.

LIMITATION

[44] The defendants had only claimed NCR over the PL by way of counterclaim in 2012. The evidence showed that in 1997 the plaintiff had started works on the PL (Q&A8 of WSP3) yet the defendants had not objected or complained though the defendants of the second suit had produced a police report dated 4 December 1996 (p 16 of DBOD1) lodged by TR Nawek/Nawie against the plaintiff. There was also the RH Riggie's suit MR 22–50 of 1996 against the plaintiff to challenge the PL where TR Nawek (now known as RHB) gave evidence as witness but the said suit was dismissed in 2000.

[45] The plaintiff said the defendants namely those in the second suit did not sue or challenge the issuance of the PL when they knew of it 15 years ago and also that they had not challenged the constitution of the LPF in court. The plaintiff submitted their inaction is fatal to their alleged NCR claim as being not bona fide and clearly caught by limitation under the Public Authorities Protection Act 1948 ('the PAPA') had they counterclaimed against the government. The plaintiff had referred to *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794; *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427; [1990] 2 CLJ (Rep) 169; *Baltim Timber Sdn Bhd v Director of Forests & Ors* [1996] 4 MLJ 103.

[46] The plaintiff had also submitted that the defendants' NCR claims are statutory barred under Items 72, 97, 110 and/or 112 of the Sarawak Limitation Ordinance ('the SLO'). The plaintiff submitted that based on the provisions namely Items 110 and 112 the limitation period expired 12 years ago from 1997 when works for the development of the PL were commenced. The plaintiff also submitted that by 2009 the defendants' claim was time barred as the counterclaimed was only filed on the 30 July 2012 and 18 October 2012 respectively. It is also the plaintiff's submission that in the event Items 110 and 112 are not applicable then Item 97 would apply and the defendants' counterclaim was already barred in 2003. The plaintiff had referred to *Litus Jau*.

[47] Having read the evidence it is my finding that the defendants would have known of the status of the LPF in 1958 when they allegedly came to settle within the vicinity of the LPF. Those residents of the 12 longhouses listed in the Second Schedule to the *Gazette* Notification in 1951 would have told the defendants of the three longhouses about this LPF. The residents of the three longhouses should have taken steps to register their claims or commence action against the government or the Department of Lands and Surveys or the Forest

Department then in 1958. In 1993 when the PL was issued the defendants should have taken action against the government but did not. When the plaintiff commenced development of the said BLE in 1997, the defendants of the three longhouses should have seen the cultivation of the BLE yet did not lodge any complaints with the plaintiff and had not filed any action against the plaintiff and the government on their NCR claims. Is also in evidence that there was this RH Riggie's Suit No MR 22–50 of 1996 to challenge the PL where TR Nawek (now known as RHB) gave evidence as witness which was dismissed in 2000. RHB should have commence action in 1996 if they wanted to challenge the status of PL. I therefore cannot understand why the defendants have to wait until the plaintiff filed their suits then only raised their claims of NCR in their counterclaim. I have to agree with the plaintiff that the defendants' action against the government had they named the government in their counterclaim would be barred under PAPA. The defendants' counterclaim against the plaintiff is also time barred under the Sarawak Limitation Ordinance.

TRESPASS

[48] What is trespass? Who is a trespasser? In law, a trespasser is one who wrongfully enters on land in the possession of another and has neither right nor permission to be on the land. In *Liew Yu Fatt v Teck Guan & Co Ltd* [1966] 1 MLJ 87 at p 90; [1965] 1 LNS 92, McGilligan J said: 'Trespass is, basically, an unlawful entry by one person on, or an unlawful interference by one person with, land in the possession of another'. In *Wong See Kui v Hong Hin Tin Mining Co* [1969] 2 MLJ 234; [1969] 1 LNS 202 , Raja Azlan Shah J (as His Majesty then was) said: 'Trespass consists in the intentional intrusion of another's land (see also *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530; [1994] 4 CLJ 757; *Punca Klasik Sdn Bhd v All persons in occupation of the wooden house erected on a portion of land held under grant No 26977 for Lot 4271 in the township of Johor Bahru, Johor and another action (No 2)* [1996] 5 MLJ 92; [1995] 4 BLJ 337.

[49] Since I have ruled that the defendants have not proven their claims for NCR over the PL/BLE, I find the plaintiff had a case against those residents of the three longhouses who were also named defendants in the suits for trespass, illegal harvesting of FFB and causing damage to properties on the PL/BLE and as such the plaintiff would be entitled to damages. By reading the pleadings, one would be able to immediately detect the element of trespass. There are numerous police reports made against the residents of the three longhouses as well as those vehicles that were used for transporting the FFB from the BLE. Those vehicles were stated in the police reports exhibited in the plaintiff's documents namely from RHA (see PBOD1 217), RHB (see PBOD1 218) and RHN (see PBOD1 219–221) and see also 223–225, 228–231, 233–235, 237–240, 242–247, 250–253, 255–258 and 260–263 of PBOD1.

[50] I have also gone through the numerous police reports but I find that only the following defendants were named in the police reports as exhibited in PBOD1, PBOD2 and PBOD3: for case No MYY-22–12/6 of 2012 ('the first suit') defendants 1, 2, 5, 11, 12, 13, 17, 44, 49, 55, 56, 57, 61, 62 for case No MYY-22–24/8 of 2012 defendants 1, 2, 9, 15, 17, 25, 26, 29. I find that although there were other names mentioned in the police reports and they were probably residents of the three longhouses but they are not named as the defendants in the suits.

[51] I am also reminded that it is trite law the plaintiff has the burden of proving both liability and quantum of damages, before the plaintiff can recover the sum claimed. I refer to *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465; [2014] 6 CLJ 269 (FC) where the Federal Court at: '[33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v Hyde Park Hotel* [1948] WN 89; (1948) 64 TLR 177 where Lord Goddard CJ observed:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

[52] From the police reports lodged by the plaintiff wherein those names of defendants 1, 2, 5, 11, 12, 13, 17, 44, 49, 55, 56, 57, 61, 62 for case No MYY-22–12/6 of 2012 ('the first suit') and defendants 1, 2, 9, 15, 17, 25, 26, 29 of case No MYY-22–24/8 of 2012 were specifically mentioned therein and this was not challenged by the defendants. I find that the plaintiff has on a balance of probability proven that they were the defendants that were seen trespassing BLE and harvesting the FFB. I shall allow the plaintiff's prayers (a), (b), (c), (d), (e), (f) and (g) I also find the following defendants liable for the wrongful acts and trespass for case No MYY-22–12/6 of 2012 defendants 1, 2, 5, 11, 12, 13, 17, 44, 49, 55, 56, 57, 61, 62. For case No MYY-22–24/8 of 2012 defendants 1, 2, 9, 15, 17, 25, 26, 29. I shall order the deputy registrar to assess damages and the kind of interest to be imposed. As for the defendants' counterclaim in view of my decision for the plaintiff the said counterclaim is dismissed with costs. I order a global costs of RM30,000 to the plaintiff. I so ordered.

Order accordingly.

Reported by Afiq Mohamad